

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DEMETRIUS WILSON,

Petitioner,

CASE NO. 2:07-cv-511

JUDGE GRAHAM

MAGISTRATE JUDGE ABEL

v.

MICHAEL SHEETS, Warden,

Respondent.

OPINION AND ORDER

On June 2, 2008, the Magistrate Judge issued a *Report and Recommendation* recommending that the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 be dismissed. Petitioner has filed objections to the Magistrate Judge's *Report and Recommendation*. For the reasons that follow, petitioner's objections are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

Petitioner does not object to the Magistrate Judge's recommendation of dismissal of claim four as waived; however, petitioner otherwise objects to all of the Magistrate Judge's recommendations and conclusions, and again raises all of the arguments he previously presented.

Petitioner again asserts, as cause for failing to file a timely appeal of the appellate court's October 17, 2006, denial of his application to reopen the appeal pursuant to Ohio Appellate Rule 26(B), that he was incarcerated at the Franklin County Jail and therefore did not receive notice of the appellate court's decision until the time period had already

expired to file the appeal, and that he was without adequate access to the law library or legal resources. In support of such allegation, petitioner has attached a letter from Attorney Thomas Hayes indicating that petitioner was incarcerated at the Franklin County Jail until January 23, 2007, and therefore was without adequate access to the law library or legal materials. *See Exhibit to Objections.*

Petitioner's argument is unavailing. For reasons detailed in the Magistrate Judge's *Report and Recommendation*, this Court agrees that, even assuming that petitioner can establish cause for his failure to file a timely appeal of his Rule 26(B) application, his claim of ineffective assistance of appellate counsel lacks merit. Therefore, petitioner has failed to establish cause and prejudice for failing to present his ineffective assistance of trial counsel claims to the state courts.

Petitioner also objects to the Magistrate Judge's recommendation that his claim of insufficiency of the evidence be dismissed as without merit. He clarifies that he did not intend to raise in these habeas corpus proceedings a claim that his convictions were against the manifest weight of the evidence; however, he then again argues at length that Leonel Saucedo's identification of him as the shooter was not credible, and that Rashaad Marshall should not be excluded as the shooter of Fortino Guzman-Gutierrez or as a perpetrator of the offense(s) charged. This objection likewise is not well taken. For the reasons detailed by the state appellate court, this Court agrees that, when viewing all of the evidence in the light most favorable to the prosecution, *see Jackson v. Virginia*, 443 U.S. 307, 317 (1979), the evidence was constitutionally sufficient to sustain petitioner's convictions.

Pursuant to 28 U.S.C. §626(b)(1) this Court has conducted a *de novo* review of the *Report and Recommendation*. The Court has carefully considered the entire record. For the foregoing reasons and for reasons detailed in the Magistrate Judge's *Report and Recommendation*, petitioner's objections are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

IT IS SO ORDERED.

Date: Oct. 1, 2008

S/ James L. Graham
JAMES L. GRAHAM
United States District Judge